In the Supreme Court

OF THE

United States

OCTOBER TERM, 1942

No. 494

S. C. BIGELOW, as Receiver of Virginia & Truckee Railway (a corporation), and Virginia-Truckee Transit Co. (a corporation),

Petitioner,

vs.

H. A. ANDERSON, Individually and as President and Business Agent of the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, Local No. 533 of Reno, Nevada,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE GRANTING OF THE WRIT OF CERTIORARI.

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Subject Index

Opinions Below

Anderson v. Bigelow, 130 F. (2d)—No. 3, p. 460.

U. S. D. Court Decision, 36 F. Supp. 119.

Table of Authorities Cited

Codes and Statutes

Miscellaneous

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STATEMENT.

Petitioner's summary statement of the case does not disclose any evidence or any finding by the District Court that the over-the-highway trucking service operated by the Petitioner was in any way connected with Petitioner's rail carriage.

The District Court's Finding No. 6 (R. 108) was in part as follows:

> "* * * and from that time and thence forward said general trucking service was conducted solely by said Virginia and Truckee Railway."

A labor dispute existed between the Respondent as the representative of the truck drivers, employees of the Railroad Company, and the Petitioner herein.

The Respondent, H. A. Anderson, testified that he had attempted to negotiate concerning the terms and conditions of employment for members of his union who were employees of Respondent (R. 58-67). See, also,

Charles A. Rowan testimony (R. 67-69);
James Pedrojetti testimony (R. 71-72);
Harold Anderson testimony (R. 73);
Paul Davis testimony (R. 74-75).

SUMMARY OF THE ARGUMENT.

AN INJUNCTION SHOULD NOT ISSUE BECAUSE PETITIONER HAS NOT EXHAUSTED HIS REMEDIES AT LAW.

It was the duty of Petitioner, before seeking equity jurisdiction to secure an injunction, both under the

provisions of the Railway Labor Act and the provisions of the National Labor Relations Act, to make every reasonable effort to settle the labor dispute and to make and maintain an agreement concerning rates of pay, rules and working conditions with his employees.

THE INJUNCTION ISSUED BY THE DISTRICT COURT IS VOID FOR THE REASON THAT IT WAS MADE IN THE ABSENCE OF FINDINGS NECESSARY TO SUPPORT SUCH AN INJUNCTION.

The Court's injunction was entered in the absence of an allegation in the Petition and a finding by the Court that the public officers charged with the duty of protecting Petitioner's property are unable or unwilling to furnish adequate protection; and in the absence of any evidence that the Petitioner had made every reasonable effort to settle the labor dispute by negotiation or with the aid of available governmental machinery of mediation and arbitration; that there was no evidence to support the Court's Finding No. 5 (R. 108) to the effect that Appellee had and has no plain, speedy and adequate remedy at law; that there was no evidence introduced to support Court's Finding No. 2 (R. 106) to the effect that great and irreparable injury to Appellee's business and property would result; that there was no allegation and no finding of fact by the District Court and no evidence that unlawful acts had been threatened and would be committed unless restrained; that the injunction is unconstitutional and void as constituting an infringement on the right of personal liberty and is contrary to law.

THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT IN THE INSTANT CASE IS NOT IN CONFLICT WITH PRIOR DECISIONS OF THIS HONORABLE COURT.

The Decisions cited by Respondent (Pet. pp. 9-10) are not in conflict with the decision of the Court below.

ARGUMENT OF THE CASE AND THE LAW.

AN INJUNCTION SHOULD NOT ISSUE BECAUSE PETITIONER HAS NOT EXHAUSTED HIS REMEDIES AT LAW.

It was the duty of Petitioner herein to make every reasonable attempt to settle the labor dispute existing either under the provisions of the Railway Labor Act, Title 45 U.S.C.A., Sec. 152, Appendix B, or under the provisions of the National Labor Relations Act, Title 29 U.S.C.A., Sec. 158, Appendix C.

A Railway Company in receivership is subject to the provisions of the National Labor Relations Act, 29 U.S.C.A., Sec. 152, providing:

> "Sec. 152, 'Definitions. (1) When used in this act * * * the term "person" includes one or more individuals, partnerships * * *, or receivers.'
>
> "The term '(2) "employer" includes any person acting in the interest of an employer, directly or indirectly. * * *.'"

A Railway Company in receivership is subject to the provisions of the Railway Labor Act. Title 45, U.S.C.A., Sec. 151, providing:

> "First. The term 'carrier' includes any express company, * * *, carrier by railroad, sub-

> ject to chapter 1 of Title 49, * * *, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such 'carrier'."

See, also,

Burke v. Morphy, 109 Fed. (2d) 572.

See, also, the decision of the Circuit Court below in the instant case:

130 Fed. (2d) Vol. No. 3, Pages 462, 463, Notes 1-2.

The District Court's opinion and decision (R. 82-87), at Page 86, reads:

> "The Receiver is directed to take up the matter of adjustment of wages and hours of said operators of motor trucks and motor busses with said employees and with the Interstate Commerce Commission and the National Railroad Adjustment Board as provided in said Motor Carrier Act and said Railway Labor Act. The Receiver shall also advise the Wage and Hour Division of the Department of Labor of the proceedings by him taken in the matter."

This is in effect a recognition by the trial Court of the fact that the Petitioner herein should have negotiated with his employees and should have exercised his remedies provided by law before seeking equity jurisdiction.

A labor dispute existed between Respondent, representing the truck drivers, employees of the Railroad Company, and the Petitioner herein. This is borne out by the testimony of said employees when they

testified that they were receiving less than the union scale prevalent in the community and were receiving straight time for hours worked in excess of ten hours rather than time and one-half as was paid to employees of other concerns engaged in trucking business in the same community.

H. A. Anderson testimony (R. 58-67);
Charles A. Rowan testimony (R. 67-69);
James Pedrojetti testimony (R. 71-72);
Harold Anderson testimony (R. 73);
Paul Davis testimony (R. 74-75).

All of the truck drivers employed by the Petitioner were members of the International Brotherhood of Teamsters, Chauffeurs, etc., Local No. 533.

S. C. Bigelow testimony, District Court Finding No. 8 (R. p. 109) reading:

"* * * The drivers of said trucks, five in number, are members of said Local No. 533."

The bargaining agent of the truck drivers, namely Appellant, Local Union No. 533, represented the appropriate bargaining unit or group for collective bargaining.

National Labor Relations Board v. Armour and Co., 7 N. L. R. B. 710, 712, and 10 N. L. R. B. 912, 915.

The Railway Labor Act contemplates the preservation of existing crafts and classes of employees as units for collective bargaining.

Order of Railway Conductors of America v. National Mediation Board, 113 F. (2d) 531.

Where only one union has organized truck drivers, they will be included in that bargaining unit despite their eligibility for membership in another union.

Martin Bros. Box Co., 7 N. L. R. B. 88, 92.

The employees of the Appellee Railway Co., other than truck drivers, would not be admissible to membership in Local No. 533. (See H. A. Anderson testimony, R. 58).

Sec. 151 (a), sub. fourth, Title 45, U.S.C.A., provides:

> "* * *. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purpose of this chapter."

Truck drivers being a particular class of employees not eligible for membership in a railroad brotherhood, are, therefore, an appropriate unit for the purpose of collective bargaining.

It is apparent that a labor dispute existed which was within the definition of labor dispute, as the same is defined by The Norris-LaGuardia Act, Sec. 113 (c), Title 29, U.S.C.A., Chap. 6, Appendix A.

The foregoing section has been interpreted in the case of

> *Colorado-Wyoming Express et al. v. Denver Local Union No. 13*, F. D. C. Colo. 1940, 35 F. Supp. 155, p. 158.

See, also:

> *Cole et al. v. Atlanta Terminal Co. et al.*, 15 F. Supp. 131, Notes (2-4), p. 132;

Donnelly Garment Co. v. International Ladies Garment Workers Union, 99 F. (2d) 309, Notes (2-4), p. 315;

Consolidated Terminal Corporation v. Drivers, etc. Union, 33 F. Supp. 645, p. 651.

The Respondent was the proper representative of the particular craft or class, namely all of the truck drivers employed by Petitioner. Respondent attempted to negotiate concerning the wages, hours and working conditions of members of Local Union 533. Petitioner refused to negotiate. A labor dispute existed, and the permanent injunction issued by the District Court was, therefore, in violation of the provisions of the Norris-LaGuardia Act, Chap. 6, Title 29, U.S.C.A., Sec. 108, Appendix A.

This section of the act has been construed in the cases of

Donnelly Garment Co. v. International Ladies Garment Workers Union, 99 F. (2d) 309, Notes (7-9), p. 316;

Dean v. Mayo, 8 F. Supp. 73, Notes (1-2), p. 77, 9 F. Supp. 459, affirmed at 82 F. (2d) 554;

Cole et al. v. Atlanta Terminal Co. et al., D.C., Ga. 1936, 15 F. Supp. 131, at 133.

THE RAILWAY LABOR ACT DOES NOT SUPERSEDE OR REMOVE THE PROHIBITIONS OF THE NORRIS-LA GUARDIA ACT IN LABOR DISPUTES.

Assuming, as Appellee does, that the employees of the railway company engaged in main line truck carriage in interstate commerce come within the provi-

sions of the Railway Labor Act, then, in that event, there is nothing contained in said act, either express or implied, that removes the prohibitions of the Norris-LaGuardia Act against granting injunctions in cases involving labor disputes. In the absence of the prerequisite findings of the Norris-LaGuardia Act, no injunction may issue.

The Railway Labor Act was enacted into its final form on April 10, 1936. If Congress had intended that said Act should supersede or modify the Norris-LaGuardia Act, which was enacted March 23, 1922, Congress would have said so in no uncertain language, as was done by Congress in enacting the National Labor Relations Act on March 23, 1932, Title 29, U.S.C.A., Sec. 160, sub. (h), providing:

> "Jurisdiction of courts unaffected by limitations prescribed in sections 101-115 of this title. When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by sections 101 to 115 of this title."

Further, the contention that the Railway Labor Act in no way superseded or modified the Norris-LaGuardia Act is borne out by the hearings on H. R. 7180, set forth in detail in the Appendix G of Petitioner's brief, pages 30-37, at pages 33, 37.

And, the contention is further supported by Congressional Record, Vol. 75, page 5504, as set forth in Appendix G, pages 4-43, of Petitioner's brief, where

the following language concerning the effect of the Norris-LaGuardia Act upon the Railway Labor Act is found:

> "Mr. Chairman, the law provides every detail for the settlement of disputes. Then if all direct negotiations fail, the law establishes and maintains a permanent board of mediation. Now in section 8 of this bill it is provided:
>
> > 'No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.'
>
> "So that there is a tie-up between the provisions of the railroad labor act and the necessity of exhausting every remedy to adjust any difference which might arise. The workers could not and would not think of going on strike before all the remedies provided in the law have been exhausted. If the railroads have complied, they would not, as has been suggested, be deprived of any relief which they may have in law or equity."

RAILWAY LABOR ACT DOES NOT APPLY TO EMPLOYEES OF RAILWAY COMPANY ENGAGED IN OVER-THE-HIGHWAY TRUCKING SERVICE.

The Railway Labor Act, Title 45, U.S.C.A., Sec. 151, defines "carrier" as including any express company, sleeping car company, carrier by railroad, subject to Chapter 1 of Title 49, U.S.C.A. (this Act being

the Interstate Commerce Act); the pertinent sections of said Act are set forth in Appendix D forming a part of this Brief.

The Interstate Commerce Act, Chapter 1, Title 49, U.S.C.A., does not affect a railway company, or subject it to the regulations of the Interstate Commerce Commission in so far as its over-the-highway trucking service is concerned, and, therefore, the railroad company, in so far as that trucking service is concerned, does not come within the Railway Labor Act.

In its consideration of the Railway Labor Act, being Bill H. R. 9463, a list of the railroad company representatives and a list of the employee organizations represented at the conference concerning the Bill shows that 58 railroads were represented and 20 railroad labor organizations; that all labor organizations represented were unions having a direct connection with railroad operations. No representative of the teamsters union or any truck drivers union, or any other union, other than railway crafts, were represented. See Congressional Record, May 6, 1926, pages 8806-8807.

In further support of the contention that railway employees engaged in over-the-highway trucking service do not come within the purview of the Railway Labor Act, it is interesting to note that a bill was introduced in Congress July 14, 1941 to amend the Railway Labor Act so as to extend the provisions thereof to motor carriers of passengers and property, being Bill H. R. 5314 set forth at length in Appendix E.

In the case of

United States of America, I.C.C. et al. v. American Trucking Associations, 310 U. S. 534, 84 L. Ed. 1345, at p. 1354,

this Honorable Court said:

> "The Commission and the Wage and Hour Division, as we have said, have both interpreted Sec. 204 (a) as relating solely to safety of operation. In any case such interpretations are entitled to great weight. This is peculiarly true here where the interpretations involve 'contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.' * * *."

In view of this language counsel respectfully include in Appendix F hereof, letter from the Secretary of the National Mediation Board set up under the provisions of the Railway Labor Act. Counsel for Petitioner have been furnished a copy of this letter. The Secretary of the National Mediation Board, in this letter, is making reference to that portion of the Railway Labor Act, 49 U.S.C.A., Chap. 8, Sec. 151, sub. First, defining "carriers", wherein the following words are found:

> "(other than trucking service.)"

Counsel for Respondent have been unable to find any reported rulings of the National Mediation Board or the National Labor Relations Board wherein this question has been considered.

THE RAILWAY LABOR ACT DOES NOT PROHIBIT THE RIGHT TO STRIKE OR PEACEFULLY PICKET.

There is nothing contained in the provisions of the Railway Labor Act that deprives the employees of a railroad company of the right to strike or peacefully picket, and an injunction restraining Appellant herein from advertising his grievances by striking or picketing is a violation of his rights as guaranteed by the provisions of the United States Constitution, Article XIV, Sec. 1, and this regardless of the provisions of the Norris-LaGuardia Act.

In the case of

Bakery & Pastry Drivers & Helpers, I.B.T. v. Wohl, 314 U.S. ....., 86 L. Ed. Adv. Sheets, No. 11, p. 781,

at pp. 784 and 785, the Court said:

> "* * * one need not be in 'a labor dispute' as defined by state law to have a right under the Fourteenth Amendment to express a grievance in a labor matter by publication unattended by violence, coercion, or conduct otherwise unlawful or oppressive.
>
> * * * * * * *
>
> "We ourselves can perceive no substantive evil of such magnitude as to mark a limit to the right of free speech which the petitioners sought to exercise. The record in this case does not contain the slightest suggestion of embarrassment in the task of governance; there are no findings and no circumstances from which we can draw the inference that the publication was attended or likely to be attended by violence, force or coercion, or

conduct otherwise unlawful or oppressive; and it is not indicated that there was an actual or threatened abuse of the right to free speech through the use of excessive picketing * * *"

"Mr. Justice Douglas, concurring:

"If the opinion in this case means that a State can prohibit picketing when it is effective but may not prohibit it when it is ineffective, then I think we have made a basic departure from Thornhill v. Alabama, 310 US 88, 84 L ed 1093, 60 S Ct 736. We held in that case that 'the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution.' p. 102.

"But since 'dissemination of information concerning the facts of a labor dispute' is constitutionally protected, a State is not free to define 'labor dispute' so narrowly as to accomplish indirectly what it may not accomplish directly That seems to me to be what New York has done here. Its statute (Civil Practice Act, Sec. 876a) as construed and applied in effect eliminates communication of ideas through peaceful picketing in connection with a labor controversy arising out of the business of a certain class of retail bakers. But the statute is not a regulation of picketing per se—narrowly drawn, of general application, and regulating the use of the streets by all picketeers. In substance it merely sets apart a particular enterprise and frees it from all picketing. If the principles of the Thornhill Case are to survive, I do not see how New York can be allowed to draw that line."

To the same effect, see

Taxicab Drivers Local Union v. Yellow Cab Operators Company, 123 Fed. (2d) 262, at p. 267,

where it is said:

> "Publicizing the fact respecting a labor dispute by pamphlet, banner or word of mouth must now be regarded as a right of free communication guaranteed by the Federal Constitution."

ALLEGATIONS OF APPELLEE'S PLEADINGS AND THE FINDINGS DO NOT WARRANT INJUNCTIVE RELIEF.

The provisions of the Norris-LaGuardia Act applying, there must be an allegation and a finding that the public officers charged with the duty of protecting complainant's property are unable or unwilling to furnish adequate protection. There is no such allegation and no finding to that effect.

Further, there must be an allegation and a finding that every reasonable effort has been made to settle the labor dispute. There was no such allegation and no such finding.

The District Court's finding No. 5 (R. 108), that the Petitioner had no plain, speedy and adequate remedy at law is in error, as there was no evidence in the case of Respondent's inability to respond in damages.

Even assuming that the Respondent does not come within the provisions of the Norris-LaGuardia Act, there must be an allegation and a finding that un-

lawful acts have been threatened, or would be committed, unless restrained, before an injunction could properly issue. There was no such allegation and no such finding.

THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT IN THE INSTANT CASE IS NOT IN CONFLICT WITH PRIOR DECISIONS OF THIS HONORABLE COURT.

The case of

Virginian Ry. Co. v. System Federation No. 40,
300 U.S. 515, 81 L. Ed. 789,

cited by Petitioner in his Petition, pp. 9, 17, 18, 20, 25, was a case in which the employees sought an injunction to restrain their employer from interfering with or influencing its employees in their choice of representatives, from fostering a company union and to require the employer to recognize and treat with the representatives of its employees. The Court considered the Railway Labor Act and its effect upon the Norris-LaGuardia Act. It held that the requirements of the Railway Labor Act were mandatory upon the employer, requiring him to meet with and confer with the authorized representatives of his employees and to enter into negotiation and settlement of labor disputes. It points out that if negotiation fails either party may invoke the mediation services of the Mediation Board. It holds that where the employer fails in the obligation imposed upon him by the Railway Labor Act a mandatory injunction will

issue to protect and enforce the rights of its employees. In short, the case supports the position of the Respondent here and would indicate that this Respondent could secure a mandatory injunction against the Petitioner herein requiring him to negotiate with his employees.

In the case of

Texas & N. O. R. Co. v. Railway Clerks, 281 U. S. 548, 74 L. Ed. 1034,

cited by Petitioner in his Petition, pp. 9, 26, a decree enjoining the employer from interfering with his employees in their rights of self-organization, was entered. The case is to the same effect as the *Virginian Ry. Co.* Case, supra, and not in conflict with the decision of the Court below.

The case of

American Truck Association v. United States, 210 U.S. 534, 84 L. Ed. 135,

cited by Petitioner in his Petition, p. 10, is merely a holding that the Interstate Commerce Commission is not required to fix qualifications, hours of service, etc. of all employees of a trucking concern. That the Commission is only required to fix the qualifications and hours of service of those employees whose duties relate to the safety of operation. This case is in no way in point here.

It is further respectfully submitted that the rulings of the Railroad Retirement Board in the cases cited by Petitioner's brief, p. 10, have no relevancy to the questions involved herein.

Wherefore, Respondent prays that the Petition for a Writ of Certiorari be denied.

Dated, Reno, Nevada,
November 27, 1942.

Respectfully submitted,
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JOHN S. FIELD,
Attorneys for Respondent.

(Appendices A, B, C, D, E and F Follow.)